Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed & Anor and another application

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NOS 351 & 352 OF 1979
IAN CHIN J
9 APRIL 1997

Civil Procedure *— Writ of summons — Striking out — Inordinate and inexcusable delay on part of plaintiff to proceed to trial — Plaintiffs solicitors requested court registry to refix summons for hearing — No response from registry — Solicitors wrote several letters but took no further action — Whether plaintiffs guilty of inordinate and inexcusable delay — Rules of the High Court 1980 O 18 r 19*

Civil Procedure *— Writ of summons — Striking out — Whether 'general disinterest' of plaintiff to prosecute claim may be a ground for striking out*

Civil Procedure *— Writ of summons — Striking out — When striking out may be made — Whether striking out may be made after the case has been set down for trial — Rules of the High Court 1980 O 18 r 19*

On 22 February 1979, two writs were taken out, namely the Zara suit and the Banita suit. Seventeen years later, on 21 February 1997, the defendants in the two suits took out two separate applications to have the suits struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC 1980') or under the inherent jurisdiction of the High Court, after the court had fixed the two suits for trial. It was contended that there was inordinate and inexcusable delay on the part of the plaintiffs in the conduct of the case. It was apparent from the facts that the plaintiffs' solicitors had written 17 letters requesting for the summons to be refixed for hearing. However, not a single acknowledgement was sent from the High Court Registry. The plaintiffs' solicitors on thier part also did nothing from 26 April 1986 to 21 June 1995. Counsel for defendants argued that this inactivity showed the disinterest of the plaintiffs or their solicitors in the actions and submitted that there was a new ground, namely 'general disinterest', which the court could rely on for striking out.

Held, dismissing the applications:

(1) It was not the fault of the plaintiffs or their solicitors that the summons was not refixed for hearing but entirely that of the court registry. The onus was on the court registry to put its house in order and to fix every single matter filed that was waiting to be dealt with for hearing without having to be reminded. It would therefore be a travesty to blame someone for the fault of the court registry (see p 562B–D); *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254 and *Muhammad v Muhammad Sharif* Pakistan Legal Decisions 1966 Azad J & K 5 followed; *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd* [1996] 1 CLJ 571 not followed.

(2) There was no such general ground for striking out as 'general disinterest' irrespective of the prejudice (see p 564B–E); *Vasudevan v T Damodaran* [1981] 2 MLJ 150 followed; *Hongkong Bank (M) Bhd v Raja Letchumi* [1996] 2 MLJ 35, *Public Finance Bhd v Natcom Development Sdn Bhd* [1996] 2 MLJ 657, *Sparrow v Sovereign Chicken Ltd* (8 June 1994, CA, unreported) and *Kincardine Fisheries Ltd v Sunderland Marine Mutual Insurance Co Ltd* (21 January 1997, High Court, unreported) not followed.

(3) An application to strike out may be made at any time, even after the case had been set down for trial. Order 18 r 19 of the RHC 1980 contained no limitation as to when an application might be made and the court therefore should give the rule its plain and ordinary meaning and not read into it words limiting when an application might be made (see pp 566I–567B); *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 1 CLJ 572 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 not followed.

[Bahasa Malaysia summary

Pada 22 Februari 1979, dua writ telah dikeluarkan, iaitu guaman Zara dan guaman Banita. Tujuhbelas tahun kemudian, pada 21 Februari 1997, defendan dalam kedua-dua guaman itu telah membuat dua permohonan berasingan untuk membatalkan guaman-guaman itu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') ataupun di bawah bidang kuasa sedia ada Mahkamah Tinggi, selepas mahkamah telah menetapkan dua guaman tersebut untuk perbicaraan. Adalah dihujahkan bahawa terdapat kelewatan yang melampau dan tidak boleh dimaafkan pada belah plaintif dalam pendakwaan kes. Adalah jelas dari fakta-fakta bahawa peguamcara bagi pihak plaintif telah menulis 17 pucuk surat meminta supaya saman ditetapkan semula untuk perbicaraan. Walau bagaimanapun, tidak ada sebarang pengakuan yang dihantar oleh pejabat pendaftaran Mahkamah Tinggi. Peguamcara bagi pihak plaintif juga tidak membuat apa-apa dari 26 April 1986 sehingga 21 Jun 1995. Peguam bagi pihak defendan menegaskan bahawa ketiadaan aktiviti ini menunjukkan kekurangan minat pada belah plaintif atau pegamcara mereka dalam tindakan ini dan seterusnya berhujah bahawa terdapat alasan baru, iaitu 'kekurangan minat secara am', yang boleh digunakan oleh mahkamah untuk pembatalan.

Diputuskan, menolak permohonan:

(1) Ianya bukan merupakan kesalahan plaintif ataupun peguamcara mereka bahawa saman tidak ditetapkan semula untuk perbicaraan tetapi ianya merupakan kesalahan pejabat pendaftaran mahkamah. Beban adalah di atas pejabat pendaftaran mahkamah untuk mengaturkan segala urusannya dan untuk menetapkan setiap perkara yang difailkan yang menunggu perbicaraan tanpa perlu diperingatkan. Oleh itu, adalah suatu persendaan untuk mempersalahkan orang lain untuk kesalahan pejabat pendaftaran

mahkamah (lihat ms 562B–D); *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254 dan *Muhammad v Muhammad Sharif* Pakistan Legal Decisions 1966 Azad J & K 5 diikut; *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd* [1996] 1 CLJ 571 tidak diikut.

(2) Tidak terdapat alasan seperti 'kekurangan minat secara am' untuk pembatalan, tanpa mengira prasangka (lihat ms 564B–E); *Vasudevan v T Damodaran* [1981] 2 MLJ 150 diikut; *Hongkong Bank (M) Bhd v Raja Letchumi* [1996] 2 MLJ 35, *Public Finance Bhd v Natcom Development Sdn Bhd* [1996] 2 MLJ 657, *Sparrow v Sovereign Chicken Ltd* (8 June 1994, CA, unreported) dan *Kincardine Fisheries Ltd v Sunderland Marine Mutual Insurance Co Ltd* (21 January 1997, High Court, unreported) tidak diikut.

(3) Sesuatu permohonan untuk pembatalan boleh dibuat pada bila-bila masa, walaupun kes telah ditetapkan untuk perbicaraan. Aturan 18 k 19 KMT 1980 tidak mengandungi had masa tentang bila permohonan boleh dibuat dan mahkamah patut memberi maksud yang biasa dan jelas kepada kaedah tersebut dan tidak membaca ke dalamnya perkataan-perkataan yang menghadkan masa bila sesuatu permohonan boleh dibuat (lihat ms 566I–567B); *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 1 CLJ 572 dan *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 tidak diikut.]

Notes

For a case on striking out on grounds of inordinate and inexcusable delay, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3719.

Cases referred to

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193 (refd)

Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman [1987] 1 CLJ 572 (not folld)

Boota Singh v Isman bin Hj Ali [1957] MLJ 127 (refd)

Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors [1996] 1 CLJ 571 (not folld)

Eastern Century Sdn Bhd v Hj Askil bin Manung & Anor (2 November 1996, unreported) (refd)

Goymer v Central Wheelbase Ltd (Times, 1 April 1993, CA, unreported) (refd)

Hongkong Bank (M) Bhd v Raja Letchumi [1996] 2 MLJ 35 (not folld)

Jamir Hassan v Kang Min [1992] 2 MLJ 46 (not folld)

Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor [1981] 1 MLJ 254 (folld)

Kincardine Fisheries Ltd v Sunderland Marine Mutual Insurance Co Ltd (21 January 1997, English High Court, unreported) (not folld)

Lawrence v Hodgson (1827) 1 Y & J 368 (refd)
Muhammad v Muhammad Sharif Pakistan Legal Decisions 1966 Azad J & K 5 (folld)
Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia [1995] 2 MLJ 185 (refd)
Public Finance Bhd v Natcom Development Sdn Bhd [1996] 2 MLJ 657 (not folld)
Roebuck v Mungovin [1994] 2 AC 185 (refd)
Sparrow v Sovereign Chicken Ltd (8 June 1994, CA, unreported) (not folld)
Vasudevan v T Damodaran [1981] 2 MLJ 150 (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 34 r 8(2), O 56, O 60 r 3

Nicholas Warren QC (*Jayasuria & Kah*) for the plaintiffs.
John Cherryman QC (*Chau & Thien*) for the defendants.
Juprin Wong Adamal for the Government of the State of Sabah.

Cur Adv Vult

Ian Chin J:

Introduction

On 22 February 1979 two writs, Civil Suit No 351 of 1979 and Civil Suit No 352 of 1979 were taken out and I shall refer to them as 'the Zara suit' and the 'Banita suit' respectively. The Zara suit was taken out by the board of trustees of the Sabah Foundation, Sinsuran Sdn Bhd and Seranum Sdn Bhd against Datuk Syed Kechik bin Syed Mohamed and Zara Sdn Bhd. The claim in the Zara suit was against Datuk Syed Kechik for an account of profits and for an order of payment for losses; and as against Zara Sdn Bhd, an account of profits by a constructive trustee. The Banita suit was a claim by the board of trustees of the Sabah Foundation and Seranum Sdn Bhd against Datuk Syed Kechik and Syarikat Banita Sdn Bhd for an account of profits in respect of certain timber concessions. On 21 February 1997, 17 years later, the defendants in the two suits took out two separate applications to have the suits struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC 1980') or under the inherent jurisdiction of the High Court after the court had fixed the two suits for trial. Arguments were heard on 27, 29 and 31 March 1997. It was contended that there was inordinate and inexcusable delay.

Whether there was inordinate and inexcusable delay

As for the Zara suit, I do not propose to go through each and every year that has elapsed since the filing of the writ. There is basically no serious complaint directed at the inaction from 1979–1981 when the parties'

solicitors had instituted various proceedings concerning the pleadings leading to the filing of the summons for directions ('the summons') on 8 August 1981 which summons was heard on 26 October but adjourned generally with no return date. On 23 December 1981, the plaintiffs' solicitors requested the High Court registry to refix the summons for hearing but this met with no success, not even after subsequent numerous written requests; viz, one in 1982, another in 1983, three in 1984, nine in 1985 and three in 1986, the last being on 26 April 1986. These 17 letters requesting for the summons to be refixed for hearing did not manage even a single acknowledgment from the High Court registry. As if induced or infected by the inaction of the High Court registry, the plaintiffs' solicitors also underwent a period of inaction because they did nothing from 26 April 1986 to 21 June 1995, a period of more than nine years for which initially no explanation was offered for such inaction but by a subsequent affidavit (which came as a result of the submission that the solicitor should have seen the deputy registrar of the High Court concerning the unanswered letters) the solicitor said:

> 7 As to the suggestion in para 5.6(a), over the years on a few occasions when I was in court, I had seen the then deputy registrar regarding the Zara and Banita suits. I do not have any record of these meetings. However, from my experience, it was the practice to see the assistant registrar on such matters.
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> 8 As to para 5.6(b), it was and still is not a practice in the profession for counsel to see judges regarding their cases unless there were exceptional circumstances as explained in paras 18–21 of my affidavit dated 7 March 1997.

In relation to the attendances before the deputy registrar which the solicitor deposed to, they were criticized by Mr John Cherryman QC, learned counsel for the defendants, as lacking in detail, in particular as to when and what was discussed and whether they were of any value. I agree with that submission because that averment was such a gloss over the details that it served no purpose and if it was intended to explain the inaction of more than nine years, it failed miserably. In relation to the 'exceptional circumstances' which the solicitor explained in his affidavit, it was elaborated in his earlier affidavit of 7 March in this way:

> 18 I was in court together with my then pupil, Mr Junior Koh for Suit No K280 of 1990 on 20 June 1996 for a hearing in chambers before His Lordship Ian Chin J. After the hearing, the court gave counsel a list of cases fixed for trial before His Lordship. His Lordship observed that trial dates for cases filed in the 1990s were already given by his court. His Lordship expressed his concern that there may be earlier cases set down for trial but not fixed for hearing yet. Counsel were encouraged to let the court know of such cases.
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> 19 I was in court together with my then pupil, Mr Junior Koh for Suit No T26 of 1991 on 23 July 1996 for a hearing in chambers before His Lordship. The case was for a trial which was adjourned in chambers for the purpose of a settlement out of court between the parties. After the hearing, His Lordship made the same observations set out in para 18 hereof.

20 I attended court together with my then pupil, Mr Junior Koh for Suit No K1201 of 1985 on 14 August 1996 for a hearing in chambers before His Lordship. Counsel for the plaintiffs was Mr Ho Kin Kong of Ho Chong Yong Vanugopal. After the hearing, I gave a written note to His Lordship. The written note contained the suit numbers and names of the parties for the Zara and Banita suits. I had also indicated to His Lordship the status of the Zara and Banita suits.

21 On 30 September 1996, my firm received a notice of hearing from the High Court stating that the trial date for Suit No 352 of 1979 was to be on 27 January 1997. A copy of the said notice of hearing dated 28 September 1996 is now produced and shown to me marked 'AD-6'.

The events prior to the 'exceptional circumstances' were these. The plaintiffs' solicitors were earlier roused to action when the sessions court, to which the dockets of the two suits had ended up, wrote to them to inform them that the case would be mentioned in the sessions court on 25 July 1995 and they replied on 10 October 1995 requesting the case to be sent back to the High Court. This was done when the sessions court, on 25 October 1995, informed the plaintiffs' solicitors that the case docket had been sent back to the High Court. The plaintiffs' solicitors did nothing for another two months until 8 January 1996 when they wrote to the High Court registry to fix an early trial of the suit when the summons had not yet been dealt with; and this was followed by another eight similar letters, the last one being on 2 September 1996 requesting a hearing date for the trial of the suit. It was only on 15 October 1996 that the plaintiffs' solicitors reverted to requesting a hearing date for the summons and this was followed by another reminder on 15 November 1996.

Again, all these letters met with no response. Another month of inaction followed. On 6 January 1997, the plaintiffs obtained an ex parte Mareva injunction. The High Court, on 7 January 1997 on its own motion, then issued a notice to the solicitors of all the parties of the two suits requiring them to attend before me on 9 January 1997 to explain why the Zara suit should not be heard together with the Banita suit which had been fixed for trial commencing 27 January 1997. It was on 9 January 1997 also that the court was supposed to hear all matters relating to the grant of the injunction. On that day, the issue of joint trial was adjourned to 15 January 1997 for argument while the matter of the injunction was adjourned to 21 February 1997. On 15 January 1997, I ordered the two suits to be tried together and I also gave directions relating to the Zara suit. The date of trial was moved to 3 March 1997. On 30 January 1997, the defendants' solicitors gave the plaintiffs' solicitors notice that they would be applying to strike out both the suits.

It was against this backdrop that Mr Nicholas Warren QC, learned counsel for the plaintiffs, argued that there was no delay on the part of the plaintiffs or their solicitors because, as I had summarized, the summons had been taken out as required by the rules and that it was all up to the court to have the summons refixed for hearing after it had been filed, which the court did not do. Learned counsel then quoted the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one) and referred to *Lawrence v Hodgson* (1827) 1 Y & J 368 at p 372 and *Muhammad*

v Muhammad Sharif Pakistan Legal Decisions 1966 Azad J & K 5 at p 9, where it was said:

> There is ample authority for holding that litigants should not be allowed to suffer on account of a mistake of the court and we hold accordingly.

On the other hand, Mr John Cherryman QC contended that it was not sufficient for the plaintiffs to write those letters, which were submitted to be perfunctory, and then sit back for well over 17 years when the court was not moved by those letters but that the plaintiffs or their solicitors should have pursued the matter further by: (a) raising the point specially with the deputy registrar at an appointment arranged with him; and if that failed, (b) writing to and or making personal request to a judge or the senior judge of the High Court in Kota Kinabalu. Since they did none of that, learned counsel argued they could not be heard to say that their own delay should be excused due to the fault of the court. Counsel referred to *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors* [1996] 1 CLJ 571 to support that proposition. *Chern Yen Ming & Anor* dealt with O 56 r 1 of the RHC 1980 which provides for an appeal against the decision of a registrar to a judge in chambers by serving a notice in Form 114 on every party to attend on a day specified in the notice and sub-r (3) of O 56 r 1 says the notice 'must be issued within five days after the decision appealed against' and served not less than two clear days before the day fixed for the hearing of the appeal. The appellant in that case filed Form 114 within the time allowed for appeal but the court only signed and sealed Form 114 some 10 months later. The learned judge in that case, relying on *Boota Singh v Isman bin Hj Ali* [1957] MLJ 127, held that the word 'issued' must mean the date that the court actually signed, sealed and dated Form 114. The learned judge in that case also said at pp 574–575:

> The primary responsibility rests with the solicitors for the third and fourth defendants to ensure that the court issued the notice in Form 114 within five days after the decision appealed against. It is an exercise in futility to put the blame to the court in issuing the notice on 10 October 1993. The court is totally blameless. It is the legal duty of the solicitors for the third and fourth defendants to observe the strict provisions of O 56 r 1(3) of the RHC 1980. If need be, it is the duty of the solicitors to pursue the matter of issuing the notice within time with the relevant court officer and this must surely be the best way to comply with the stringent requirements of O 56 r 1(3) of the RHC 1980.

That case which speaks of a duty 'to pursue the matter ... with the relevant court officer', a proposition also made by Mr Cherryman QC, calls for an examination of the RHC 1980 to see if such a duty, which duty necessarily means ensuring that the court officers do their job, had been imposed. In this aspect, I am unable to find any rule imposing such a duty. In fact, the rules impose many duties upon the court officers, such as those found in O 60 of the RHC 1980, which rules if observed by the court officers would ensure the proper administration of justice. One of those duties is to maintain various books and registers, like the cause book, the summons in chambers book and the register of appeals from the subordinate courts. From those books, the court officers keep track of the record of each

matter. Another duty is in O 60 r 3 which is sealing and dating (with the date it was filed) documents filed with the court. Take the case of a summons in chambers or Form 114 where the date of hearing by the judge must be inserted before the summons in chambers can be returned for service. The date of hearing is not inserted without consulting the judge with the result that the documents must be left behind with the court registry until such time after the judge has been consulted and the date of hearing has been obtained. That should not cause any problem (other than that of lost files and documents) if the documents were signed, sealed and dated the day they were received — which they should be on the authority of *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254, where Chong Siew Fai J (as he then was) said at pp 255–256:

> However, *Boota Singh*'s case, in my view, is distinguishable. In that case, no question arose respecting the time of presenting the summons to the court for sealing and the effect thereof. Indeed, from the report of the case, it is not known when the summons was presented for sealing. The point there in issue was whether the Limitation Ordinance ceased to run when the plaintiff requested the court clerk to prepare the summons or whether it continued to run until the summons was actually sealed and issued. In the instant case, the plaintiffs had filed the writ and paid the fee therefor within the period of limitation but from the date appearing on the writ it seemed that the court official had signed and sealed the writ after the expiration thereof.
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> Counsel for the plaintiff contended that since the writ had been filed and payment therefor made on 2 November 1977 (these are not challenged), which was before the expiration of the period of limitation, what the registry officials did with the writ of summons thereafter was beyond the plaintiffs' control and the suit must be taken to have been instituted within time.
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> Since all acts relating to the issue of the writ of summons herein were done before 31 May 1980, only the Rules of the Supreme Court 1957 ('the RSC 1957') need be considered.
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> Order 2 r 8 of the RSC 1957 provides that '*Every writ of summons ... shall bear the date on the day on which the same shall be issued ...*' (Emphasis added.); and
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> Order 5 r 11 thereof provides: 'Every writ of summons shall be sealed with the seal or stamp of the court and shall be dated and signed by the registrar.'
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> In *Clark v Bradlaugh* [1881–85] All ER Rep 1002, it was held that the issue of a writ of summons in an action was not a judicial act but the act of the plaintiff. Now what has a plaintiff to do in the High Court registry in Kuching when he wants to issue a writ of summons? He or his advocate will properly prepare and sign the required copies of the writ and praecipe and submit them to the proper officer in the court registry for dating, signing and sealing after paying the prescribed fee. Once these are done, the plaintiff has completed his part in the issue of a writ. What is required thereafter is some act of the court official, eg the affixing of the seal of the court and so on, to give the writ its validity (O 5 rr 11, 12 and 13). Having regard to the provisions in O 2 r 8, the writ should, to my mind, be dated on the day the writ is filed and the filing fee is paid, and with the same date of the filing and the payment. This is in line with such cases as *Pritam Kaur v S Russell & Sons Ltd* [1973] 1 All ER 617, where the expiry date of the

limitation period of a suit fell on a public holiday, the plaintiff issued the writ on the following day and the writ was dated with the date of that following day. Indeed, as Denning LJ said in *Pritam Kaur* on p 619:

> 'As soon as the offices of the court re-opened on Monday, 7 September 1970, the plaintiff issued the writ. That is today, her solicitors took the writ to the offices of the district registry at Leicester. A clerk in the registry stamped it with the official stamp in the proper place (*locaus sigillare*). It was then duly issued.'

The present dispute arose because of the irregular practice of the court registry in Kuching. Until a few months ago, it did happen that writs of summons presented to the registry were dated a few days after their being filed. However, this practice has ceased and all writs filed are now dated with the same dates on which they are filed and filing fees paid. The state of affairs in the instant case was the result of the previous erroneous procedure. It is clearly unjust and prejudicial to the plaintiffs who, unless remedial measure is available and taken, will be made to suffer owing to no fault of their own or their advocates. Can anything be done about it? In *Kirk v Dolby* 151 ER 567, the writ of summons was mistakenly dated and it was held that the court had power to order amendment of the date thereon to correspond with that appearing on the praecipe which was correctly dated. The question of statutory limitation did not arise in *Kirk v Dolby*, whereas, in the instant case, limitation of action is in issue, there is therefore all the more reason that amendment should be allowed.

and also on the authority of O 60 r 3(1) of the RHC 1980 which says:

> Any document filed in the registry in any proceedings must be sealed with a seal showing the date on which the document was filed and any document not required by these rules to be sealed must show the date on which it was filed.

Therefore, be it a writ, summons in chambers or Form 114, it must, in my view, be signed and dated the date it was filed. More to the point, it is the responsibility of the court officers that it should be done and thus I am respectfully unable to agree with *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors* which did not advert to *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* which concluded that it was all up to the court officers to do what was needed after the documents had been filed. Another relevant case not referred to is *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 (SC) where the following passage appears at p 195:

> Mr Humfrey Ball argues that the meaning of the words 'entered for hearing' appearing in O 52 r 3(2) is the date on which the registrar fixed the date of hearing, ie 9 November 1985 ... . We do not agree. In our judgment, having regard to the practice of our court, the words 'entered for hearing' in that sub-rule also mean the filing of the notice of motion. In the circumstances, the leave has not lapsed since the motion was filed on 16 July 1985, ie within 14 days after the leave was granted ... .

and upon which passage I would have relied to say that Form 114 would be regarded as having been issued on the day it was filed. I am also unable to agree because no one should be visited with the fault or inefficiency of the court registry (see *Muhammad v Muhammad Sharif*).

This brings me to the question of whether the plaintiffs' solicitors should have seen the deputy registrar or the senior judge when their letters met with no response, instead of sitting back doing nothing for about nine years and just writing those perfunctory letters. The RHC 1980 does not impose such a duty. On the one hand, if the court registry worked as it was supposed to, there would be no problem in re-fixing the summons for hearing. It is only when it was not working as it should have that calls for the actions suggested by Mr Cherryman QC. However, the fact remains that it was through no fault of the plaintiffs or their solicitors that the summons was not re-fixed for hearing but entirely that of the court registry. Though the suggested measures may have brought about some results, the failure to take them did not mean that the plaintiffs or their solicitors had been at fault because the conduct of the matter was governed by the RHC 1980, there was no infringement of the same and therefore there had been no default. The onus was on the court registry to put its house into order and to fix every single matter filed that was awaiting to be dealt with for hearing without having to be reminded to do so. The instructions to the court registry were given in the praecipe when payment was made. Any registry which was efficient would have dealt with the matter without any need for any reminder. In my view, in this case, it would be a travesty to blame someone for the fault of the court registry.

Could the plaintiffs and their solicitors then be faulted for the period of more than nine years when the plaintiffs and their solicitors did not send any reminders nor did anything to get the summons re-fixed for hearing? It must be remembered that the root of the problem lay in the court registry not re-fixing the summons for hearing. Because of that so many years had gone by without action. If the plaintiffs and their solicitors were really interested in proceeding with the case, they would surely have taken measures — if not by seeing the deputy registrar or the senior judge — then by writing to them with details of the delay and the action that was urgently needed. Though the initial fault lies with the court registry and though a failure to take the measures I have just mentioned was not a breach of the RHC 1980, nevertheless it evinces the disinterest of the plaintiffs and the solicitors in the action. This brings me to the question of whether such disinterest can be a ground for striking out the action.

Whether there is a new ground — 'general disinterest' — for striking out

Mr Cherryman QC argued that though the courts in Malaysia had hitherto followed the traditional approach to striking out, such as *Vasudevan v T Damodaran* [1981] 2 MLJ 150 (FC), the Court of Appeal and the Federal Court appear to have accepted as a matter of law that broader principles apply as set out in the following passage in *Hongkong Bank (M) Bhd v Raja Letchumi* [1996] 2 MLJ 35 (CA) at p 44:

> In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In the present case, there is the added consideration that the bank paid lip service obedience to the order of the Supreme Court.

> The circumstances of the present case, when taken as a whole, fairly support an inference that the bank is not really interested in the cases it has filed. There is, therefore, no plausible reason for allowing these suits to remain on file.

and also as set out in the following passage in *Public Finance Bhd v Natcom Development Sdn Bhd* [1996] 2 MLJ 657 (FC) at p 663:

> First, there is absolutely no question of there having been a long delay on the part of the plaintiff in prosecuting the action. Those who invoke the process of the court must be prepared to act timeously in having their grievances heard. The courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest.

and at p 664:

> The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be summarized thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Earlier on, Mr Cherryman QC had adverted to the sentiments in two English cases to the effect that the traditional approach was too restrictive and called for it to be relaxed. One such case was *Sparrow v Sovereign Chicken Ltd* (unreported, 8 June 1994 (CA)) where Sir Thomas Bingham MR at p 241 stated that:

> ... the time may come when the House of Lords will review the existing state of authority and give thought to the question whether on proof of inordinate and inexcusable delay the court should not have a more general discretion to dismiss an action for want of prosecution if, in all the circumstances, that seems the right course to take.

and where Millet LJ at p 245 said:

> ... I have long been one of those who consider that the law took a wrong turning when it insisted that inordinate and inexcusable delay was not sufficient but that there must also be a risk that the fair trial of the action would no longer be possible or that some other prejudice to the defendant should have resulted from the delay. As the law stands, however, that additional requirement must be satisfied before an action can be dismissed for want of prosecution. I wish to echo the sentiments of my Lord, the Master of the Rolls, that this is an aspect of the law which ought to call for reconsideration.

The other case referred to is *Kincardine Fisheries Ltd v Sunderland Marine Mutual Insurance Co Ltd* (unreported, 21 January 1997, English High Court) where Colman J said:

> I venture to suggest that the sooner the whole structure of this jurisdiction is simplified, the better. It is difficult to see why there should not be a general jurisdiction to strike out for want of prosecution any claim which for any reason whatever is simply too stale for a fair trial. Since that is the law, I must now embark on the deplorably cumbersome analytical exercise which ever since *Allen v Sir Alfred Mcalpine & Sons Ltd* [1968] 2 QB 229 English law has required.

It is common ground that in so far as English law is concerned, there is no such general ground for striking out as 'general disinterest' irrespective of prejudice. As for Malaysian law, Mr Cherryman QC submitted that on the two Malaysian authorities he had just cited, there is such discretion which Mr Warren QC disagreed with. In my view, the law is the same as in England ever since the Federal Court decision of *Vasudevan v T Damodaran*, which means that there is no such ground as 'general disinterest' irrespective of prejudice. This brings me to *Hongkong Bank (M) Bhd v Raja Letchumi*, where the term 'not really interested' was used on which case I have commented very extensively in my unreported decision of *Eastern Century Sdn Bhd v Hj Askil Bin Manung & Anor* (2 November 1996, High Court, Kota Kinabalu (unreported)). I wish to add that in view of the Federal Court decision in *Vasudevan v T Damodaran* which is binding on the Court of Appeal, the law must be as that stated in *Vasudevan v T Damodaran* and 'general disinterest' irrespective of prejudice is not a ground as confirmed by *Sparrow v Sovereign Chicken Ltd* and *Kincardine Fisheries Ltd v Sunderland Marine Mutual Insurance Co Ltd.* If the law is to be changed, it would be by the Federal Court and thus I am of the view that the Court of Appeal case of *Hongkong Bank (M) Bhd v Raja Letchumi* could not and should not be read as changing the law as hitherto been laid down by *Vasudevan v T Damodaran.*

This brings me to consider the most recent Federal Court case of *Public Finance Bhd v Natcom Development Sdn Bhd* (decided after *Hongkong Bank (M) Bhd v Raja Letchumi*) to see whether it has changed the law. The facts in that case were as follows. A writ was taken out on 24 October 1990 for the repayment of a loan under a guarantee for which defences were filed on 24 June 1992. Directions for trial were obtained but not complied with. On 26 January 1994, the court issued a notice under O 34 r 8(2). On 13 February 1994, it was explained that the steps to prosecute the action were overlooked and the court acceded to the request for a month to comply, which was granted, and the hearing was adjourned; but the order was not complied with until 14 April 1994 which was beyond the one-month. When the court sat on 21 April 1994, it struck out the action because of the failure to comply 'with the undertaking to set down the matter for trial within a month's time'. On appeal, the Federal Court set aside the striking out because: (i) the long delay before 13 February 1994 was no longer an issue because the court had, on that date, granted an extension of time for compliance with the order of the court; (ii) the court had proceeded on the wrong footing that there was a breach of an undertaking when there was none; and (iii) the court had failed to consider

A that by 21 April 1994, everything was in place for a trial date to be fixed. It was after that conclusion that the Federal Court went on to say, at p 664:

> The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this court and nothing may be
B usefully added to the learning contained in them. The effect of those decisions may be summarized thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

C Assuming the same test applies when an application to strike out a suit is made under O 34 r 8(2) or O 18 r 19 of the RHC 1980 or the inherent jurisdiction of the court, the law or the test, in my view, must be the one as laid down in *Vasudevan v T Damodaran* and 'general disinterest' irrespective of prejudice is not a ground. Thus when the Federal Court
D summed up the law as it did, I am of the respectful view that the summary:

> Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

E was incorrect because the law which the Federal Court attempted to summarize hitherto contains no provision for striking out on the ground of 'general disinterest'. Could the Federal Court (in *Public Finance Bhd v Natcom Development Sdn Bhd*) then be taken to have laid down a new general ground of 'general disinterest' for striking out? Though speaking
F for myself I would rather it did as it would definitely lighten my burden, nevertheless I am of the view that it does not because, as I have said, the law has all this while been as laid down in *Vasudevan v T Damodaran* which does not advert to 'general disinterest' irrespective of prejudice as a ground and the Federal Court was merely attempting to summarize what
G had been laid down in *Vasudevan v T Damodaran* (and other Federal Court cases since that decision) and it made, in my respectful opinion, a wrong summary. The Federal Court, if it had intended that there be a new test of 'general disinterest', should have said so expressly but did not do so. Thus, I am in agreement with Mr Warren QC that there is no such new ground for striking out in a case based on 'general disinterest'. Therefore,
H such 'general disinterest' must be included in the test laid down by *Vasudevan v T Damodaran* but as I have said earlier, the plaintiffs or the solicitors are not to be blamed because they have done all that was required by the RHC 1980 and it was entirely the fault of the court registry in not re-fixing the summons for hearing.

I What I have said thus far, in my view, is sufficient to dismiss the application for striking out the Zara suit and what I have said applies equally to the Banita suit which stands in a far better position than the

Zara suit. The plaintiffs set the Banita suit down for trial on 11 October 1983 and then followed it with letters to the court registry. Though the choice of words of those letters was inept, they were nevertheless clear enough to anyone in the court registry to show that a request was made for the court to fix a date for the hearing of the case. There were five such letters in 1984, three in 1986, five in 1990, one in 1991 and two in 1995. It was then followed by the proceedings of the Zara suit by the plaintiffs' solicitors in the sessions court. The request resumed in 1996, nine letters in all. Finally, the court registry acted on 28 September 1996 and the judge fixed the case for trial on 27 January 1997.

Though what I have said so far is sufficient to dispose of the applications, I would refuse to strike out the two suits on other considerations as well.

Other factors for not striking out

After the notice of hearing for the Banita suit was served on the defendants' solicitors, they responded by making an application on 18 October 1996 to have the trial rescheduled to 3 March 1997 which the court obliged. On 9 and 15 January 1997, the court heard arguments as to why the Banita suit and Zara suit should not be tried together and the court, on 15 January, ruled that they should and also gave directions for the Zara suit and reaffirmed the trial date of 3 March for both suits. It was only on 30 January that the defendants indicated that they would be applying to have both suits struck out. Both suits were subsequently postponed to 23 June 1997 on a without prejudice basis.

These two suits were all ready for trial before the defendants gave indication on 30 January 1997 that they would be applying to have the two suits struck out. Though this alone was not sufficient to bar the applications, it was a factor to be taken into account (*Roebuck v Mungovin* [1994] 2 AC 185 and *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 185). Mr Warren QC had argued that an application for striking out under O 18 r 19 cannot be made once an action has been set down for trial and relied on *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 1 CLJ 572 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46. I will first deal with *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* where Zakaria Yatim J (as he then was) spoke of O 18 r 19 at p 575 in these terms:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see 1 *Supreme Court Practice* 1985 at p 304).

In *Jamir Hassan v Kang Min* [1992] 2 MLJ 46, Haidar J also decided, relying on *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman*, that an application to strike out must be refused after the action had been set down for trial. Mr Cherryman QC submitted that both cases are not good

authorities because the practice has since the 1985 White Book been stated differently in the 1997 White Book at para 18/19/4, viz:

> The application may be made even after the pleadings are closed (per Brett MR in *Tucker v Collinson* (1886) 34 WR 354, or the trial set down (*Goymer v Central Wheelbase Ltd*, Times, 1 April 1993 (CA)) though it should not be heard at the opening of the trial, save in exceptional circumstances (*Halliday v Shoesmith* [1993] 1 WLR 1 (CA)).

Learned counsel argued that the rule contains no limitation as to when an application can be made and the court should give the rule its plain and ordinary meaning (*Goymer v Central Wheelbase Ltd* at pp 16 and 18–19) and not read into it words limiting when an application can be made. Since the two Malaysian authorities are not binding on me, I respectfully refuse to follow them and accept the proposition of law that the application can be made at any time, even after the case has been set down for trial for the reasons stated by Mr Cherryman QC.

I agree with Mr Cherryman QC that the issues in the two suits called for oral evidence for which, on account of the death of some of the witnesses, the defendants would be prejudiced. However, what brought the prejudice in those deceased persons not being able to give evidence in court was not the result of any blameworthy conduct on the part of the plaintiffs or their solicitors but that of the court registry and the plaintiffs should not be punished for it. Therefore, in view of the facts that the two suits had already been set for trial and the plaintiffs were not to be blamed for the delay, I am of the opinion that, notwithstanding the prejudice the defendants had suffered, the two suits should not be struck out.

Conclusion

Accordingly, I dismiss the two applications with costs to the plaintiffs.

Applications dismissed.

Reported by Kenneth Goh